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Supreme Court, U.S.
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No. 98-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

ROBERT PHILLIP CHRYSLER,
Petitioner,

vs.

CITY OF WEST COVINA, etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the definition of "deadly force," as that term is used in *Tennessee v. Garner*, 471 U.S. 1 (1985), means only force "reasonably likely to kill," rather than force "creating a substantial risk of death or serious bodily harm," the definition used by the trial court and by every other appellate court that has addressed the issue except for the Ninth Circuit's decision in *Vera Cruz v. Escondido*, 139 F.3d 659 (9th Cir. 1997)?

2. Regardless of whether the dog attack is "deadly force," is evidence that a police dog attack like the one on petitioner is likely to cause serious injury relevant on petitioner's claim he was subjected to excessive force in violation of the Fourth Amendment standard stated in *Graham v. Connor*, 490 U.S. 385 (1989)?

LIST OF PARTIES

Petitioner Robert Phillip Chrysler was plaintiff and appellant in the courts below. Respondents City of West Covina, Ronald Holms, and Brad Smith were defendants and appellees in the courts below. David Reaver and his company Adlerhorst, Inc., were defendants in the trial court. Paul La Commare and Paul Jolly were dismissed as defendants in the trial court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROBERT PHILLIP CHRYSLER

Petitioner,

vs.

CITY OF WEST COVINA, etc., et al.,

Respondents.

Petitioner Robert Phillip Chrysler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on December 4, 1998.

OPINION BELOW

The opinion of the Court of Appeals is not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on December 4, 1998. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 5, 1999. Apx. B-1. This petition for certiorari was filed

within 90 days of February 5, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The District Court Proceedings.

Mr. Chrysler sued in district court under 42 U.S.C. § 1983, claiming he was subjected to excessive force during the course of his arrest by City of West Covina police officers. Defendants were the city, West Covina Police Chief Ronald Holms, West Covina police officer Brad Smith, and Smith's trainer, Reaver.[1] Mr. Chrysler claimed that Smith ordered a police dog to attack him where such force was excessive and in violation of the lethal force rule of *Tennessee v. Garner*, 471 U.S. 1 (1985).

The gravamen of the suit was that Smith, a police dog handler, ordered his police dog to attack and seriously injure plaintiff during the course of his September 21, 1993 arrest. Regarding the arrest and the force used against plaintiff, the district court asked the jury to decided four disputed questions of fact:

> 1. Did plaintiff have a jacket on his shoulder concealing his right hand? Answer: Yes.
>
> 2. Did Officer La Commare order plaintiff to put his hands up? Answer: Yes.
>
> 3. Did plaintiff reach for the floor immediately before the dog received the order to bite? Answer: Yes.

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[1] The liability of the City, the police chief Holms, and Reaver and his company was derivative from the liability of defendant Smith. Hence, judgment in Smith's favor meant that judgment had to be entered in favor of the remaining defendants as well. Apx. A-2; Apx. C-5.

4. Did the use of the police dog create a substantial risk of death or serious bodily injury? Answer: No.

Apx. C-3 & n. 1 (District court order and judgment).

Because the jury answered "no" to question 4, the district court did not analyze the dog attack under the *Garner* deadly force rule. Apx. C-4 & n.2 thereto. Relying on the non-deadly force standard of *Graham v. Connor*, 490 U.S. 385 (1989), the district court concluded the dog attack was objectively reasonable. Apx. C-4-5.

B. The Ninth Circuit's Decision.

On appeal, Mr. Chrysler argued that the trial court wrongly excluded evidence on the risk of serious injury from police dog attacks like the one he suffered. Had the evidence been admitted, the jury may very well have found that the dog attack *did* present a substantial risk of death or serious injury, thus triggering the *Garner* lethal force rule. He also argued that the excluded evidence was relevant to showing that the dog attack was objectively unreasonable under *Graham v. Connor*. The Ninth Circuit rejected Mr. Chrysler's contention, relying on that court's recent decision in *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997). In *Vera Cruz*, a police dog bite case, the Ninth Circuit held a police officer's use of "deadly force" as that term is used in this Court's decision in *Tennessee v. Garner*, "means force reasonably likely to kill." 139

F.3d at 660.[2] Evidence showing only a likelihood of serious injury not rising to a probable outcome of death can not trigger the *Garner* rule. 139 F.3d at 663 & n.3. In Mr. Chrysler's case the excluded evidence was only "relevant to the capacity of police dogs to inflict serious injury," an irrelevant consideration post-*Vera Cruz*. Apx. A-4-6. Thus, the Ninth Circuit panel affirmed. Apx. A-7-8. The panel did not discuss whether the excluded evidence, even if not establishing deadly force as defined by *Vera Cruz*, was nevertheless relevant to plaintiff's theory of excessive force under *Graham v. Connor*.

REASONS FOR GRANTING WRIT

Key to the panel's decision was the Ninth Circuit's earlier decision in *Vera Cruz* wherein the court of appeal defined deadly force to mean *only* force "reasonably likely to kill." Apx. A-5-6; 139 F.3 at 661. Thus, the instant-case raises the issue -- what is "deadly force" as used in *Tennessee v. Garner*, and in particular, is deadly force that force which creates a substantial risk of death or serious injury, *i.e.*, the Model Penal Code definition? ("MPC")? In short, was *Vera Cruz* correctly decided?

In *Tennessee v. Garner*, this Court placed limits on the police use of "deadly force" holding that such force could be constitutionally employed only to "seize" felons who the officer had probable cause to believe presented a significant of death or serious injury to the officer or others. 471 U.S. at 3. This court did not

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[2] *Vera Cruz* was decided while this matter was on appeal. Consequently, the trial court, in submitting question four to the jury, was relying on the generally accepted definition of deadly force, *i.e.*, force "which creates a substantial risk of causing death *or serious injury*." *Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir. 1996) (emphasis added). Apx. C-3, n.1.

define "deadly force" in *Tennessee v. Garner* because it had no need to. The force used in that case, a gunshot, was obviously deadly.

While the facts in *Garner* concerned a shooting death, until *Vera Cruz*, *Garner* has never been read as being limited to weapons "reasonably likely to kill." To the contrary, police agencies and the decisional law treated *Garner* as applying to any use of deadly force as defined by the Model Penal Code ("MPC") or its equivalent. Until *Vera Cruz*, there was a national consensus that deadly force was not limited to force likely to kill but included force substantially likely to cause "serious bodily injury." *Vera Cruz's* new formulation has no apparent roots in any decision of this Court, or any other court, and is significantly narrower than the definition of "deadly force" actually employed by law enforcement agencies across the country.

Under the Ninth Circuit's view, the fact that a reasonable police officer would know that the use of a police dog was likely to cause "serious bodily injury," including the gruesome injuries suffered by the petitioner here, does not call for any special Fourth Amendment limitation on the use of such force. *Garner*, according to the Ninth Circuit, newly limited to that small category of police weapons reasonably likely to actually kill a fleeing suspect - flesh-tearing dog bites, capable of rendering life-long disability, are now subject in the Ninth Circuit's view only to the generic standard of *Graham v. Connor*.

The circuit courts are now split on that issue of urgent national importance. The intervention of this Court would establish clear national standards, either the standards already widely accepted by the courts and law enforcement agencies and urged in this case by petitioner, or the unique standard adopted by the Ninth Circuit.

I. THE DECISION, BY RELYING ON *VERA CRUZ*, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, ALL OF WHICH HAVE ADOPTED THE MODEL PENAL CODE DEFINITION OF DEADLY FORCE FOR FOURTH AMENDMENT PURPOSES.

Vera Cruz is the *only* decision to reject the MPC formulation on the limits on the use of deadly force, a definition accepted by law enforcement agencies across the country and all of the courts that have previously considered this issue. *Vera Cruz* has great potential to destabilize the settled national understanding of the limitations on police use of deadly force widely accepted by law enforcement agencies and in existing Fourth Amendment jurisprudence after this Court's decision in *Tennessee v. Garner*.

In determining what forms of police use of force must satisfy the requirements for the use of "deadly force" under the *Tennessee v. Garner* standard, courts have employed the MPC's definition of force that "creates a substantial risk of causing death or serious bodily harm." This standard is designed to avoid the grossly disproportionate use of force that led to petitioner's debilitating injuries in circumstances where less dangerous measures are clearly warranted. The Ninth Circuit's standard, especially in the context of the use of police dogs, authorizes the use of a weapon that is capable of imposing horrific injuries on members of the community in circumstances where such injuries are clearly disproportionate to any legitimate law enforcement objective.

That the Ninth Circuit's definition, as stated in *Vera Cruz*, conflicts with that followed by the other circuits, is clear: "Other circuits do seem to have adopted the MPC's definition of deadly force . . ." *Vera Cruz*, *supra*, 139 F.3d at 662. For instance, the Eleventh Circuit in *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985), rejected the definition later advanced by the Ninth Circuit

in *Vera Cruz*. In *Pruitt*, the defendant city argued its officer had not used deadly force even though he intentionally shot the suspect because the officer "had not tried to kill Pruitt but, rather only shot to stop him from hitting his legs." 771 F.2d at 1479 n.10. The Eleventh Circuit held that the MPC deadly force definition, in particular, the prong concerning "serious physical injury," properly defined deadly force "in the constitutional sense." Consequently, that court held that the officer, by shooting at the suspect's legs, used deadly force because the shooting was "force capable of causing *serious bodily injury*." 771 F.2d at 1479-80,n.10 (emphasis added).

In *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the Sixth Circuit adopted the MPC definition in a police dog bite case, as identifying the factors a court should consider in evaluating a use of force under *Tennessee v. Garner*. *Id.* at 912 (stating that the MPC definition of deadly force was a "useful statement of the two factors most relevant to the determination of whether the use of a particular law enforcement tool constitutes deadly force."). *See Mathews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) (reaffirming validity of approach in *Robinette* and the use of the Model Penal Code definition of "deadly force").

In *Ryder v. City of Topeka*, 814 F.2d 1412, 1416-1417 (10th Cir. 1987), the Tenth Circuit reaffirmed that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The *Ryder* court emphasized that "deadly force does not occur only when the suspect actually dies," and noted that [s]everal courts have adopted the Model Penal Code definition of deadly force." 814 F.2d at 1416 n.11.

The Eighth Circuit employed the MPC formulation in *Mathis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1975) (*en banc*), *vacated as moot sub nom*; *Ashcorft v. Mattis*, 431 U.S. 171 (1977),

describing "deadly force" as "such force as under normal circumstances poses a high risk of death or serious injury to its human target, regardless of whether or not death, serious injury or any harm actually results in a given case." *Id.* at 1009.

The Third Circuit also affirmed the use of a "deadly force" instruction based upon the MPC definition and *Garner* in a § 1983 action involving a police dog attack in *Marley v. City of Allentown*, 774 F.Supp. 343 (E.D. Pa. 1991), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1991), in the context of the "seizure" by biting of a fleeing misdemeanor suspect. *See also Mathis v. Parks*, 741 F. Supp. 567 (E.D.N.C. 1990), wherein the court found a full force blow to the abdomen using the knee was "deadly force" because such force may "cause serious bodily harm." 741 F. Supp. at 572 & n.3.

The Fifth Circuit, in a case decided post-*Vera Cruz*, followed the Third, Sixth, Eighth and Eleventh Circuits and adopted the MPC definition. *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) ("These courts have generally described 'deadly force' as force 'carrying with it a substantial risk of causing death or serious bodily harm.' . . . Accordingly, we find both the definition of 'deadly force' [using the MPC definition] and *Garner's* holding to have been clearly established established prior to November 1994."). Indeed, before *Vera Cruz* the Ninth Circuit had supported the MPC definition of deadly force as the appropriate standard to determine whether an application of force by the police had to meet the *Tennessee v. Garner* standard. *Fikes v. Cleghorn*, 47 F.3d 1011, 1014 n.2 (9th Cir. 1995) (court "that it ['deadly force'] might be defined as a 'force that creates a substantial risk of causing death or serious bodily harm." *Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir. 1996) ("Deadly force has been described as 'force that creates a substantial risk of causing death or serious bodily injury harm.'").

II. THE NINTH CIRCUIT'S DEFINITION OF DEADLY FORCE IS AT ODDS WITH THIS COURT'S DECISION IN *TENNESSEE v. GARNER* AND WELL-ESTABLISHED POLICE STANDARDS.

"There is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm." W. GELLER & M. SCOTT, DEADLY FORCE: WHAT WE KNOW, 23 (Police Executive Research Forum 1992) ("DEADLY FORCE"). The Intentional Association of Chiefs of Police ("IACP") in its Model Policy for the use of force, deadly and non-deadly, defines "deadly force" as "[a]ny use of force that is likely to cause death or *serious bodily harm*." DEADLY FORCE, *supra*, at 478 (emphasis added). Indeed, Smith, the police dog handler whose dog attacked petitioner, had been trained that "that deadly force for police officers is that force which is reasonably capable of causing death *or serious injury*." 2 RT 86:3-12. *See also People v. Nealis*, 232 Cal. App. 3d Supp 1, 283 Cal. Rptr. 376, 378 (1991) (dog held to be deadly weapon).

In *Tennessee v. Garner*, this Court stressed the relevance of actual department policies in defining the Fourth Amendment limits on the use of force. *Tennessee v. Garner*, 471 U.S. at 19-20. The Ninth Circuit's *Vera Cruz* formulation – "reasonably likely to kill" – undermines the consensus between the courts and the police on the definition of "deadly force," inevitably resulting in an increase in the incidence of deaths and serious bodily injuries caused by the police in a wide range of police encounters with members of the community.

Vera Cruz's justification of its definition of "deadly force" -- the "self-defeating" nature of using deadly force to set in motion the criminal justice system means that *Garner* must only be concerned only with force reasonably likely to cause death, 139 F.3d at 663 --

is flawed. This Court's reasoning in *Garner* supports using the MPC definition. Using force that is likely to cause serious bodily injury, although not as likely to cause death as a firearm, to seriously injure and permanently maim a non-dangerous suspect, amounts to punishment summarily imposed out of proportion to the crime which prompted police intervention. Moreover, *Vera Cruz's* definition wrongly presumes there is a bright line between force capable of causing death and that capable only of causing serious bodily injury. For example, if the police use a rattlesnake to bite, using *Vera Cruz's* reasoning the police have not used a deadly weapon since the statistical probability of death from the snake bite is less than one-tenth of one percent.[3] 139 F.3d at 663 & n3. Yet can one really say that a rattlesnake used to bite does *not* create a substantial risk of death?

III. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER EVIDENCE DEMONSTRATING A CAPACITY AND LIKELIHOOD OF SERIOUS INJURY IS RELEVANT IN DECIDING OBJECTIVE REASONABLENESS UNDER *GRAHAM V. CONNOR*.

In *Graham*, this Court held:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the *nature and quality of the intrusion* on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake.

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[3] In the United States, about 7000 persons per year are bitten by poisonous snakes (rattlesnakes, cottonmouths, and copperheads), resulting in less than six deaths per year. F.E. Russell, *Snake Venom Poisoning* 268 (1983).

Graham v. Connor, 490 U.S. at 396 (emphasis added).

Because "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," *Schmerber v. California*, 384 U.S. 757, 767, (1968), the "nature and quality of the intrusion" of using a large and aggressive dog to attack and mutilate a person, even though a suspect, should require an inquiry into the risks of harm and permanent injury. A seizure that is accomplished by threatening to grab a person by the arm will be judged differently than a seizure threatened by slicing open the arm and legs, severing muscle and vessels, injecting infectious and life-threatening bacteria, etc.

In *Winston v. Lee*, 470 U.S. 753 (1985), decided a few years before *Graham*, this Court held that an assessment of the "risk of injury," including in particular the "general risks of harm or death," was an essential factor in analyzing the constitutionality, under the Fourth Amendment, of a compelled surgery. The Commonwealth of Virginia sought to force respondent, a defendant in a criminal action, to undergo surgery to remove a bullet from his shoulder the Commonwealth believed was evidence of crime. At first, the Commonwealth was able to justify the surgery by medical evidence indicating that the surgery presented respondent with minimal risk of permanent injury. 470 U.S. at 756-57. However, when additional evidence surfaced indicating a greater risk of permanent injury, the lower federal courts enjoined the surgery. 470 U.S. at 757-58. Finding that the compelled surgery ran afoul of the Fourth Amendment, the Supreme Court affirmed. Among the key reasons were (1) the degree of intrusion into respondent's body, and (2) the risk of injury that the intrusion presented. 470 U.S. at 760, 761, 766. Indeed, in footnote 4 *Winston* cited with approval a string of lower court decisions and law review articles that "recognized the crucial importance of this factor," *i.e.*, the *risk* of injury in assessing constitutional reasonableness. 470 U.S. at 761 n.4.

The teaching of *Winston* is simple: the reasonableness of a seizure involving a physical intrusion into a person's body is not analyzed in a vacuum. Among the critical factors are the risks of injury. What is the medical evidence on the likely consequences? How likely is it that the seizure will permanently injure; how invasive is the seizure?, etc. A controlled opening of the body by medical personnel using appropriate medical procedures is one thing. *Winston*, 470 U.S. at 761. Doing it with an animal trained to attack human beings as if they were prey is another.

The panel's decision in this case underscores the need for this Court's review. The panel found the excluded evidence was "relevant to the capacity of police dogs to inflict serious bodily injury" but, relying on *Vera Cruz*, concluded the evidence was irrelevant to plaintiff's Fourth Amendment claim. Apx. A-5-6. Although the panel's conclusion is wrong, see *Winston v. Lee*, it has a superficial logic. If risk of injury evidence is relevant only to a lethal force theory and the evidence does not demonstrate a better than 50/50 probability of death, see *Vera Cruz*, 139 F.3d at 663 & n.3, then the evidence is properly excluded.

This Court should grant review to decide if evidence on the risk of serious injury is relevant in determining if the force used violated the Fourth Amendment reasonableness standard announced in *Graham*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
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Attorneys for Petitioner

NOT FOR PUBLICATION
UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

No. 97-55596
D.C. No. CV-95-06265 SWV

ROBERT PHILLIP CHRYSLER,

Plaintiff-Appellant,

FILED
DEC 4 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

vs.

CITY OF WEST COVINA; RONALD HOLMES; WEST COVINA POLICE BRAD OFFICERS BRAD SMITH, #258; PAUL LA COMMARE, #247; PAUL JOLLY, #125, and other unknown WEST COVINA POLICE OFFICERS, in both their personal and official capacities; DAVID REAVER; ADLERHORST INTERNATIONAL, INC., a California corporation,

Defendants-Appellees.

Appeal from the United States District Court
For the Central District of California
Stephen V. Wilson, District Judge, Presiding

MEMORANDUM*

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted August 6, 1998
Pasadena, California

Before: FLETHCER, BOOCHEVER, and THOMPSON, Circuit Judges.

Plaintiff Robert Chrysler appeals from a judgment entered after a jury found against him in his 42 U.S.C. § 1993 suit against the City of West Covina, its police chief Ronald Holmes, its police dog handler Brad Smith, other West Covina police officers, and David Reaver and his company, Alderhorst International. The district court severed the claim against Smith from those against the remaining defendants, so that the first phase of the trial would determine only the excessive force claim against Smith. The second phase of the trial against the remaining defendants, brought under Monell v. Dep't of Social Services of City of New York, 436 U.S. 658 (1978), would proceed only if the jury found against Smith.

The district court presented to the jury a verdict from that asked the following four questions, to which the jury supplied the following answers:

1) Did plaintiff have a jacket on his shoulder concealing his right hand? Answer: Yes.

2) Did Officer La Commare order plaintiff to put his hands up? Answer: Yes.

3) Did plaintiff reach for the floor immediately before the dog received the order to bite? Answer: Yes.

4) Did the use of the police dog create a substantial risk of death or serious bodily injury? Answer: No

Based on those answers, the district court found that the officers' use of force was objectively reasonable. On appeal, Chrysler raises two evidentiary issues: the admission of Sergeant Jolly's police report about the dog-bite incident and the exclusion of certain evidence.

Chrysler also challenges the district court's denial of his motion for a directed verdict that the use of the dog was objectively unreasonable.

Discussion

IV. Evidentiary Issues

A. Sergeant Jolly's Police Report

Chrysler contends that the district court abused its discretion when it admitted into evidence the police report prepared by Sergeant Jolly on the evening of the incident. In his report, officer Jolly wrote: "La Commare . . . twice ordered [Chrysler] to raise his arms into the air. I could hear this also from my position outside the residence."

The district court, in the apparent belief that there were two layers of hearsay involved, admitted the police report as a business record that recorded an excited utterance. The excited utterance exception to the hearsay rule is inapplicable. Officer La Commare's statement was not hearsay because it was not "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid.. 801(c). La Commare's alleged command to Chrysler to raise his hands constituted a verbal act. See United States v. Artega, 117 F. 3d 388, 397 n.16 (9th Cir.) (as amended), cert. Denied, 118 S. Ct. 455 (1997). It only mattered that he issued the command; whether he meant what he said was irrelevant. Thus, only the business records exception–or some other exception–need be met.

Entries in a police report that result from the officer's own observations and knowledge may be admitted under the business records exception, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6); see United States v. Pazsint, 703 F. 2d 420, 424 (9th Cir. 1993). "The district court has wide discretion in determining whether a business record meets the standard of trustworthiness." United States v. Olano, 62 F. 3d 1180, 1206 (9th Cir. 1995).

Without adducing any specific evidence that Sgt. Jolly

fabricated his police report, Chrysler contends that the report cannot be trustworthy because Sgt. Jolly, to avoid personal liability in civil litigation, had a motive to lie about hearing Officer La Commare issue the "hands up" command. The district court determined that the circumstances did not reveal any motive to lie at the time Sergeant Jolly wrote the report. "The report was made shortly after the events. The officer who wrote the report heard the same thing that his fellow officer [] says he said to plaintiff, and so forth."

The Advisory Committee Notes, which provide "a useful guide in ascertaining the meaning of the [Evidence] rules, " tom v. United States, 513 U.S. 150, 160 (1995), are helpful on this point. "[A]bsence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion." Fed. R. Evid. 803 (6) advisory committee's note.

In Palmer v. Hoffman, the Supreme Court held that an accident report prepared by a railroad employee was excludable because the business of the railroad company was "railroading," not the preparation of accident reports. 318 U.S. 109, 114 (1943). By contrast, police officers routinely prepare reports recording their observations. The Supreme Court has noted that the basis of the "shop book rule," the ancestor of Rule 803(6), is "[t]he probability of trustworthiness of records because they were routine reflections of the day to day operations of a business." Id. At 113-14. The district court adequately considered whether the circumstances of the preparation of the police report indicated a lack of trustworthiness, and it did not abuse its discretion in admitting the report.

B. Exclusion of Avila Medical Summaries and Adlerhorst Photos

1. Exclusion of the Avila Medical Summaries

Chrysler sought to introduce the Avila Medical Summaries, a summary of dog bit cases, solely for the purpose of showing the capacity of a trained police dog such as this one to cause death or serious injury. Because the summary was hearsay, Chrysler sought

to introduce it under Fed. R. Evid. 803 (8) governing public records, or Rule 803(24), the residual exception for statements having "equivalent circumstantial guarantees of trustworthiness," now codified as Rule 807. Without explanation, the district court ruled, "I'm not receiving the exhibit."

None of the 72 cases described in the Avila summaries resulted in a death caused by dog bite. After Vera Cruz, the relevance of serious bodily injuries resulting from dog bites is limited to the question whether the force employed "posed more than a remote possibility of death." Vera Cruz v. City of Escondido, 139 F.3d 659, 663 (9th Cir.) (as amended), cert.denied, 119 S. Ct. 164 (1998). The only rational inference from these summaries, however, is that dog bites do not pose such a risk of death. Thus, we need not decide whether the district court abused its discretion when it excluded the summaries because any error was harmless.

2. Exclusion of the Adlerhorst Photographs

Chrysler sought to introduce photographs depicting injuries inflicted by Adlerhorst-trained police dogs used by the City of Montebello, California, again for the purpose of showing the capacity of Adlerhorst-trained police dogs to cause death or serious injury. The City sought to have the photographs excluded as irrelevant under Rule 402 because they did not involve the West Covina Police Department, and they depicted wounds inflicted by dogs other than "Rocky." The City also sought to have the photographs excluded under rule 403 because they were "very graphic." The district court excluded the photos on both bases.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. "We give the district courts 'wide latitude' when they balance the prejudicial effect of proffered evidence against its probative value." United States v. Spencer, 1 F.3d 742, 744 (9th Cir. 1992) (as amended). The graphic Adlerhorst photographs, without doubt, are relevant to the capacity of police dogs to inflict serious bodily injury. Since Vera Cruz, however, the capacity of police dogs

to inflict serious bodily injury is no longer relevant to the question of whether the police employed deadly force. Because of the limited relevance of the photos
and their graphic nature, it was not an abuse of discretion for the district court to exclude them under Rule 403.

II. Jury Instructions

"[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it." Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702, 706 (9th Cir. 1978).

A. Proposed "Serious Bodily Injury" Jury Instructions

The district court gave the jury its own revised, pared down version of Chrysler's proposed jury instruction defining "serious bodily injury." After Vera Cruz, "serious bodily injury" without a reasonable probability of causing death no longer satisfies the definition of deadly force. Thus, any error by the district court in tailoring Chrysler's proposed jury instruction was harmless. See Vera Cruz, 139 F.3d at 663.

B. Proposed "Adverse Inference Rule" Jury Instructions

The district court refused to give Chrysler's proposed jury instruction on the adverse inference rule, which read: "If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not."

An essential condition of the application of the rule is that the evidence be under the adverse party's control and reasonably available to him. Chrysler adduced no evidence that the officers confiscated the jacket or had control over it except momentarily. In fact, Chrysler maintains that no jacket ever existed, and would have the jury infer from the City's failure to produce the jacket that it never existed. Chrysler's proposed application of the rule does violence to its rationale as explained by Procfessor Wigmore:

> "The failure to bring before the tribunal some circumstance, document, or witness . . . serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party."

UAW v. NLRB, 459 F.2d 1329, 1336 (D.C. cir. 1972) (quoting 2 J. Wigmore, Evidence § 285 (3d ed. 1940)). It is plain that there must exist both the opportunity, and a refusal, to bring forward evidence. If the jacket never existed, the City never had the opportunity to introduce the evidence, and it would be improper to infer that the City was refusing to introduce it out of fear that the evidence was adverse. Thus, the district court did not abuse its discretion by deciding not to give the instruction to the jury.

III. Denial of Chrysler's motion for a directed verdict

Chrysler moved for a directed verdict that the use of the dog was unreasonable as a matter of law. This court reviews the district court's decision on a motion for a directed verdict de novo. Morgan v. Woessner, 997 F.2d 1244, 1252 (9th Cir. 1993).

"The 'reasonableness' off a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396 (1989). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. At 397.

The jury credited Officer Smith's and Officer La Commare's testimony that Chrysler had a jacket on his shoulder concealing his right hand, and that he reached for the floor immediately before Officer Smith ordered the dog to bite Chrysler. There was substantial evidence showing that Chrysler's right hand was obscured from the officers' view, and that Chrysler reached to the

ground instead of obeying their command to put his hands up. Although no weapon was found, we must "allow[] for the fact that police officers are often forced to make split-second judgments– in circumstances that are tense, uncertain, and rapidly evolving." Id. There was substantial evidence upon which the district court could conclude, as it did, that the "officers could reasonably have believed that Chrysler posed an immediate threat to their safety." Because there was substantial evidence to support a verdict for the City, a directed verdict would have been inappropriate.

III. Requested Remand for Reconsideration in Light of Vera Cruz

Chrysler contends that this court should remand the case to the district court because he "never had the opportunity to prove his deadly force theory under the more stringent standard . . . announced in Vera Cruz."

The jury verdict form posed the question, "Did the use of the police dog create a substantial risk of death or serious bodily injury?" To determine whether the police used deadly force under Vera Cruz, the verdict form would properly ask instead, "Did the use of the police dog create a reasonable probability of causing death"

Any use of force that created a reasonable probability of causing death would necessarily also have created a substantial risk of death or serious bodily injury. Therefore, because the jury found that the force used created no substantial risk of death or serious bodily injury, it could not have found the same use of force created a reasonable probability of causing death.

AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT PHILLIP CHRYSLER,

Plaintiff-Appellant,

FILED
FEB - 5 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

vs.

CITY OF WEST COVINA; RONALD HOLMES; WEST COVINA POLICE BRAD OFFICERS BRAD SMITH, #258; PAUL LA COMMARE, #247; PAUL JOLLY, #125, and other unknown WEST COVINA POLICE OFFICERS, in both their personal and official capacities; DAVID REAVER; ADLERHORST INTERNATIONAL, INC., a California corporation,

Defendants-Appellees.

No. 97-55596

D.C. No. CV-95-06265-SVW

ORDER

Before: FLETHCHER, BOOCHEVER, and THOMPSON, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and recommends rejection of the suggestion for rehearing en banc.

The full court as been advised of the suggestion for rehearing

en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT CHRYSLER,

Plaintiff,

v.

CITY OF WEST COVINA, ET AL.,

Defendants.

Case No. CV 95-6265 SVW

THIS CONSTITUTES ENTRY AS REQUIRED BY FRCP RULE 77(d).
CLERK, U.S. DISTRICT COURT
MAR 20 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY
FILED
CLERK, U.S. DISTRICT COURT
MAR 19 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ORDER RE: JUDGMENT FOR THE DEFENDANTS

Robert P. Chrysler has brought this case based on his claim that West Covina police officers used excessive force against him when they arrested him on September 21, 1993. He does not contest the legality of his arrest.

Most of the facts that form the basis of this case are undisputed. On September 21, 1993, a warrant was issued for plaintiff's arrest on charges of robbery and grand theft.

At about 6:00 p.m. on that date officers went to plaintiff's West Covina condominium to make the arrest. Since plaintiff was a felony parolee, his parole officer was contacted and the officers

received further authority for a search of the residence. Upon arriving at the front door officers heard that a TV was on inside. One of the officers tested the door and found it unlocked. He opened the door and announced "it's" the West Covina Police Department and for Robert Chrysler to come to the front door." This announcement was repeated several times. However, neither plaintiff nor anyone else came to the door in response to the officer's repeated comments.

A K-9 unit was called and Officer Brad Smith responded to the scene with his police dog, Rocky. After announcing that a dog would be deployed and receiving no response from within the house, officers entered with the dog. A quick search of the condominium revealed nothing, but the police dog "alerted" on the inside door to the attached garage located at the end of a hallway off the bedroom. At this point the officers announced "whoever is in the garage, this the police. Come out or we are going to be sending in a dog." After receiving no reply the officers opened the door and sent in the police dog. What happened next was the matter of dispute between the parties.

Defendant Officers Smith and La Commare claim they stood in the doorway while the police dog entered the garage. They saw Chrysler standing with a jacket draped over the right side of his body. Officer La Commare ordered Chrysler to put his hands up. Instead of obeying the police order, however, Chrysler suddenly leaned over as though to pick something up off the floor. Fearing that plaintiff might be retrieving a weapon, Officer Smith ordered his dog to bite plaintiff.

Chrysler claims that when the police dog entered the garage he was sleeping on a sofa. He arose from the sofa upon hearing the police announcement outside the interior door to the garage. He was not wearing a jacket draped over his arm. Officer La Commare did not order him to put his hands up. He did not reach for the floor just before the dog was ordered to bite him. Instead, he claims that the interior door to the garage opened and the police dog entered the garage. The police officers stood in the doorway and ordered the dog

to attack without any warning.

Chrysler's case, therefore, turned largely on the dispute between the parties as to what happened in the garage. The parties also disputed the issue of whether or not the use of the police dog constituted "deadly force."

The jury was asked to answer four factual questions:[1]

1. Did plaintiff have a jacket on his shoulder concealing his right hand?

2. Did Officer La Commare order plaintiff to put his hands up?

3. Did plaintiff reach for the floor immediately before the dog received the order to bite?

4. Did the use of the police dog create a substantial risk of death or serious bodily injury.

The jury answered yes to question one, two and three. The jury answered no to question four.

Claims that law enforcement officers used excessive force when making an arrest "should be analyzed under the Fourth Amendment and its "reasonableness standard." Graham v. Connor,

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[1] The Court elected to present the jury with a special verdict pursuant to Federal Rule of Civil Procedure 49. Normally, the Court would have had the jury decide the "reasonable force" issue. Here, however, there was a dispute between the parties as to whether or not the use of the police dog constituted deadly force. The Ninth Circuit has indicated that the tests for the use of deadly force and non-deadly force involve distinct inquiries. See Fikes v. Cleghorn, 47 F.3d 1011, 1014 n.2 (1994); Quintanilla v. City of Downey, 84 F.3d 333, 357 (9th Cir. 1996). Because the Court found that giving the jury two separate set of "reasonable force" instructions would be confusing for the jury, it elected, after lengthy discussions with counsel on both sides, to have the jury decide only the material factual issues in dispute between the parties.

490 U.S. 386, 395, 109 S.Ct 1865, 1871 (1989).[2] The standard is an objective one.[3] The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. Id. At 396-397, 109 S.Ct. at 1871-72. A reviewing court may not employ "the 20/20 vision of hindsight" and must make "allowance for the fact that police officers are often forced to make spit-second judgments-in circumstances that are tense, uncertain, and rapidly evolving." Id. At 396-397, 109 Ct. at 1872.

Even though the question of whether or not the force used by defendants was reasonable is usually a matter for the jury, the trial court can decide the issue if there are not material factual disputes between the parties. Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994). The jury's verdict resolved all the material factual issues in this case.

Here, Officer Smith faced a suspect wanted for crimes, robbery and grand theft, that involved the potential for violence. The suspect wore a jacket over his shoulder concealing his right hand. Instead of obeying Officer La Commare's order to put his hands up, the suspect made a movement towards the floor. Officer Smith then commanded the police dog to bite the suspect.

Given Chrysler's refusal to obey Officer's La Commare's command and his threatening movement, the defendant officers could reasonably have believed that Chrysler posed an immediate threat to their safety. Under the circumstances the defendant officers

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[2] The court utilizes the Graham test instead of the factors listed in Tennesse v. Garner, 471 U.S. 1 (1985), because the jury found that the use of the police dog did not constitute the use of deadly force.

[3] In the context of unreasonable force cases, the inquiry on the merits is identical to the inquiry as to qualified immunity. Scott, 39 F.2d at 914.

would likely have been justified in using deadly force against Chrysler. See, Elliot v. Leavitt, 99 F.3d 640, 642-43 (4th Cir. 1996) (collecting cases upholding police shooting despite officer's mistaken belief suspects were reaching for weapons). Here, however, the jury has found that Officer Smith used non-deadly force to subdue Chrysler. Therefore, this Court finds that the officer's use of force was objectively reasonable under the circumstances.

Because the officers only used reasonable force against Chrysler he did not suffer a violation of his constitutional rights. Scott, 39 F.3d at 916. "While the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights." Id. Since no constitutional violation occurred, the municipal defendants cannot be held liable.

IT IS SO ORDERED.

DATED: 3/18/97

/S/
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE